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In the Supreme Court of the United States

No. 75-223

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

vs.

EDDIE JACKSON & RONALD GARRETT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION

The Commonwealth of Pennsylvania respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court reversing the Pennsylvania Superior Court is reported at _____ Pa. _____, 337 A.2d 582 (1975) and is printed as Appendix A. The unanimous opinion of the Pennsylvania Superior Court affirming the trial court is reported at 228 Pa. Superior Ct. 885 (1974), and 228 Pa. Superior Ct. 386 (1974), and is printed as Appendix B. The two opinions of the trial court are reported at 23 Cumberland Law Journal 34 and 24 Cumberland Law Journal 59 and are printed as Appendix C and Appendix D.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on May 13, 1975. The jurisdiction of this court is invoked under 28 U.S.C. §1257 (3) and by United States Supreme Court Rule 19 §1 (a).

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QUESTIONS PRESENTED

I.

May information gained five months before a search conducted with a warrant pointing to involvement by accused in large-scale drug trafficking, together with a Federal narcotic violation arrest, be given weight by a magistrate in determining probable cause to search where respondent's present conduct is corroborative of probable continuous activity inherent in large-scale narcotic operations?

II.

Does the interpretation by the Pennsylvania Supreme Court of what constitutes probable cause to search with a warrant under the Fourth Amendment of the United States Constitution require an unreasonable burden upon the government to conduct a "little trial" before a magistrate may authorize a policeman to conduct a carefully limited search?

III.

Should the application of the exclusionary rule be modified where it penalizes a brilliant, innovative police investigation without providing a deterrent to outright illegal police activity?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which the above-entitled Petition involves is as follows:

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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STATEMENT OF THE FACTS

On June 14, 1972, Trooper George Wynn of the Pennsylvania State Police, while on duty and on routine patrol of the Pennsylvania Turnpike, observed a black-over-blue Ford Thunderbird traveling at a high rate of speed. Following a high-speed pursuit for some eight to ten miles, the vehicle was halted, (156 a). The operator produced an operator's license issued to Eddie Jackson of Detroit, Michigan, and a Michigan registration for the vehicle in the name of Teresa Brown of Detroit, Michigan. The trooper thereupon advised the driver, respondent Jackson, that he would be arrested for speeding at ninety miles an hour in a sixty-five-mile-an-hour zone, (158 a). Jackson was asked to exit his vehicle and return to the patrol car with the officer; respondent Garrett remained in the Ford automobile, (158 a). While seated in the patrol vehicle, Trooper Wynn explained to Jackson that he was familiar with him as a result of a previous incident in January of 1972, and that because of information received earlier the officer believed that he was transporting large quantities of contraband across the Pennsylvania Turnpike, (158 a). Thereupon, respondent Jackson was informed of his *Miranda* rights, (159 a).[1]

Confirming Jackson's identification with his police barracks, the trooper then informed him that he intended to procure a search warrant for the search of his vehicle. He further explained that the respondent had the right to refuse a police search without a warrant. Respondent Jackson replied

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[1] Miranda v Arizona, 384 US 436 (1966)

that he understood the remarks of the officer, (159 a). In the course of questioning by Trooper Wynn, after the *Miranda* warnings, Jackson stated that he was traveling from Newark, New Jersey, and that he had left Detroit on Monday, the 12th of June, 1972, (159 a).

Leaving Mr. Jackson in the patrol vehicle the trooper then returned to the Ford Thunderbird where he advised Mr. Garrett of his *Miranda* rights. Respondent Garrett verbally acknowledged that he understood those rights. Respondent Garrett informed the trooper that he had come from Newark, New Jersey, and that he had left Detroit on Tuesday, the 13th of June, (160 a). At that point the record discloses the following:

> "A. I then went back to the patrol vehicle and confronted Mr. Jackson with the conflicting statement that Garrett gave, and Mr. Jackson informed me that Garrett probably didn't know what day it was, *that he was high.* (Emphasis added)
>
> Q. Did Jackson say anything else to you at that time?
>
> A. Jackson stated that he wasn't on the Pennsylvania turnpike in that blue Thunderbird at any time." (161 a).

The trooper then asked Jackson if he would consent to a search of the Ford Thunderbird. Jackson replied affirmatively, saying that he had nothing to hide, (161 a). Prior to the request to search, the trooper had warned Jackson (1) of his Fifth Amendment rights (159 a); (2) had informed him of the nature of the allegations against him (158 a); (3) had told him he had a right not to consent to the search without a warrant (159 a).

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Statement of the Facts

A search of the interior of the motor vehicle was conducted by Trooper Wynn and Trooper Glunt, who had subsequently arrived on the scene. The only physical item discovered was a Blue Cross identification card displaying the name Joseph Weaver, (161 a - 162 a). While searching the interior of the car, the trooper discovered that the trunk key was not with the ignition key. Trooper Wynn approached both respondents who claimed to have no knowledge of the key, (162 a). The trooper did not make any attempt to search the trunk but explained to both respondents that he intended to obtain a search warrant for the search of the Ford Thunderbird whereupon both respondents were transported to the State Police barracks in Newville, Cumberland County, (162 a). Prior to arriving at the station, respondent Garrett was asked from whom the car had been borrowed. He answered at first that he had borrowed the car from a friend and traveled to Newark, New Jersey, with a girlfriend named Ruby Smith. Trooper Wynn then explained to both respondents that the same vehicle had been stopped on the 14th of June, 1972, for speeding on the Pennsylvania Turnpike by a Trooper Moyer and that his report indicated that the vehicle was occupied at that time by two negro males. Respondent Garrett then changed his statement saying that he was accompanied by a male friend named Reuben Smith and that the officer had misunderstood his initial remarks, (163 a).

Following arrival at the Newville barracks, Trooper Wynn, accompanied by Trooper Glunt, and respondent Jackson went to the office of District Justice Esther Cohick in Newville, (164 a). At the office of Mrs. Cohick, respondent Jackson plead guilty and paid the fine and costs for the summary speeding violation, (164 a - 165 a). Thereafter, Trooper Wynn obtained a search warrant for the search of the Jackson and Garrett

vehicle, a 1972 Ford Thunderbird Coupe, Michigan Registration JWB 992, the sworn affidavit for which sets forth the following facts:

"That the facts upon which the affiant relies and verily believes are as follows: That on or about the 14th day of June, 1972, the above described vehicle and occupants were stopped for speeding, 90 MPH in a 65 MPH zone. Eddie (NMN) JACKSON, DOB 15 June 44, was the operator of the vehicle. Ronald (NMN) GARRETT, DOB 29 Jul 42, was the occupant in the right front seat.

This officer was aware of previous activities of Eddie (NMN) JACKSON in reference to large scale Narcotics traffic in the Detroit, Michigan area.

On 21 Jan 72, Eddie (NMN) JACKSON, DOB 15 June 44, was arrested by Tpr. Michael M. BRENNAN PSP-Newville for traveling at an excessive rate of speed and making improper lane cahnges. [sic] At the time of this arrest JACKSON had in his possession a brown paper bag containing approximately $25,000.00 in U.S. paper currency. JACKSON was traveling Eastbound at the time of this arrest.

Further investigation in reference to the activities of Eddie (NMN) JACKSON revealed that as of 21 Jan 72, Detroit P.D. was in receipt of information received from a reliable CONFIDENTIAL INFORMANT which indicated that JACKSON was a large scale Narcotics Dealer in Detroit, Michigan.

On 21 Jan 72, the brown paper bag with currency was returned to JACKSON and he continued to travel

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Eastbound on the Pa. Turnpike.

This officer was aware of the previously stated information prior to stopping the Ford Thunderbird for a traffic violation.

On 14 June 72, Eddie (NMN) JACKSON informed this officer that they were returning from Newark, New Jersey. JACKSON further stated that they made the trip to Newark, New Jersey on Monday, 12 June 72.

Ronald (NMN) GARRETT, informed this officer that they made the trip to Newark, New Jersey on Tuesday, 13 June 72.

State Police reports indicated that the previously described vehicle was stopped the morning of 14 June 72 for speeding. Ronald (NMN) GARRETT was the operator and the vehicle was traveling Eastbound on the Pa. Turnpike in Cumberland Co. The State Police report indicated that the vehicle contained two (2) occupants.

JACKSON & GARRETT were appraised of the above facts and verbally advised of their Constitutional Rights.

JACKSON informed this officer that he was not an occupant of the vehicle on the morning of 14 June 72 when it was stopped for speeding. JACKSON further stated that GARRETT was "HIGH" when he made the trip and probably did not known [sic] what day it was. JACKSON stated he was in Newark, N.J. and GARRETT borrowed the car and made the trip to Newark to pick him up.

GARRETT informed this officer that the passenger in the vehicle in the morning of 14 June, 72 was Ruby SMITH, a girl friend, that was dropped off in Newark, N.J. at an unknown location. GARRETT then changed his statement to indicate that the name of the passenger on the morning of 14 June 72 was Reuben SMITH, a male companion of his. GARRETT could not give the name and address of the owner of the vehicle.

GARRETT & JACKSON denied having any knowledge of the trunk key for the vehicle.

One (1) Blue Cross I.D. card in the name of Joseph WEAVER was observed on the right hand side of the rear seat of the vehicle. WEAVER was not an occupant of the vehicle.

GARRETT & JACKSON denied having knowledge of anyone using the name of Joseph WEAVER.

The described vehicle and occupants were transported to the Newville State Police Barracks.

Detroit P.D. was contacted and stated that JACKSON & GARRETT were arrested by Federal Authorities on Narcotics charges shortly after their stop on the Pa. Turnpike which occurred on 21 Jan 72.

Due to the conflicting and varying statements received from GARRETT & JACKSON, the known previous activities of GARRETT & JACKSON, the suspicious manner of behavior, the location of I.D. in the name of Joseph WEAVER in the vehicle, the alleged absence and

lack of knowledge of the trunk key, lead this officer to believe that the trunk of the vehicle contains Narcotics (Controlled Substances) and stolen I.D. & credit cards." (35a & 35b)

Trooper Wynn, Trooper Glunt and respondent Jackson returned to the State Police Barracks. Jackson and Garrett were placed under the control of another state trooper while Trooper Wynn and Trooper Glunt searched the vehicle. Access to the trunk of the vehicle was made behind the rear seat, (167 a). The units of contraband were taken from a cardboard box in the trunk and included approximately 15 pounds of high grade heroin and cocaine. Testimony at trial indicated that the great majority of the contraband was between 88% and 92% pure and was sufficient for the preparation of approximately 680,000 individual units with a street value of *$6,800,000.00,* (352 a).

Following the search the troopers arrested both Jackson and Garrett for possession of the contraband and they were taken to the office of the District Justice for preliminary arraignment. They subsequently posted $50,000.00 bail each and remain free on bail at this time.

Thereafter, the sequence of events were as follows:

1. A preliminary hearing held on June 29, 1972;

2. A suppression hearing held on September 6, 1972;

3. An additional suppression hearing held on October 10, 1972;

4. A court opinion dated November 29, 1972, overruling defendants' motions to suppress (23 Cumb. L.J. 34);

5. Both respondents waived a jury trail and a non-jury trial was held February 28, 1973, following which they were both convicted;

6. New trial motions were filed and orally argued and overruled by the court's decision on September 10, 1973 (24 Cumb. L.J. 59);

7. On October 16, 1973, each respondent was ordered to undergo imprisonment in a State Institution for not less than five (5) nor more than fifteen (15) years. In addition, each respondent was fined $10,000.00.

8. An appeal to the Pennsylvania Superior Court resulted in the following unanimous order dated May 16, 1974:

> "Judgement and sentence affirmed on the opinion of Shughart, P. J. of the court below." (228 Pa. Superior Ct. 885)

9. A petition for Allocatur was filed with the Pennsylvania Supreme Court and granted by order of September 4, 1974.

10. On September 11, 1974, the Supreme Court of Pennsylvania amended its order of September 4, 1974, as follows:

> "Petition granted limited to the issues of (1) whether the search of the interior of the automobile was a valid consent search; (2) whether the facts alleged in the affidavit for the search warrant were sufficient upon which to find probably [sic] cause to search the trunk of the automobile; and (3) whether the Fourth Amendment to the United States Constitution requires service of a search warrant.
>
> Per Curiam."

11. On May 13, 1975, by written opinion reported in _____ Pa. _____, 337 A.2d 582 (1975), the Supreme Court of Pennsylvania reversed the judgment and sentence suppressing the physical evidence of the heroin and cocaine.

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO DELINEATE PRECISELY WHAT FACTORS BEAR UPON "STALENESS" OF INFORMATION IN EVALUATING PROBABLE CAUSE FOR A MAGISTRATE TO ISSUE A WARRANT AND TO CORRECT THE MISAPPLICATION BY THE PENNSYLVANIA SUPREME COURT OF REQUIRING ACTUAL RATHER THAN PROBABLE CONTINUITY OF PRIOR CRIMINAL ACTIVITY IN AN ONGOING NARCOTIC OPERATION.

The Pennsylvania Supreme Court misapplied Federal constitutional principles in ruling that evidence to demonstrate continued criminal activity must establish actual rather than probable continuity of an illegal enterprise in determining probable cause for the issuance of a search warrant.

Sgro v. United States, 287 U.S. 206 (1932) was relied on by the Pennsylvania Supreme Court for the proposition that "stale" information will not comprise probable cause under the Fourth Amendment. The precise language of *Sgro* reads:

> ". . . proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time."

This language has formed the basis of many state appellate

decisions, and has spawned a series of federal cases on the issue of "staleness". The United States Supreme Court however has not delineated what factors bear on staleness, *Sgro* being cited only five times by the United States Supreme Court in the 43 years since its decision. Nor *has any other case* spoken definitively to the issue.

The absence of definitive enumeration of these factors has allowed state and federal appellate courts to misapply the Fourth Amendment. In the present case, part of the probable cause set forth in the affidavit was information that less than five months previously, respondent Jackson was a reputed large-scale narcotics dealer, and had been arrested by federal agents on narcotics charges. With no guidelines, the Pennsylvania Supreme Court has interpreted Fourth Amendment "staleness" so as to give no consideration whatsoever to this evidence even though corroborated by present information at the time the warrant was issued. Likewise, the ongoing nature of the crime of *large-scale* drug traffic was ignored.

The standard which the Pennsylvania court applied was that "evidence to demonstrate continued criminal activity must establish *actual* continuity of the illegal enterprise." (emphasis theirs). "Actual" was applied to mean proof beyond doubt, effectively requiring that the officer *prove* the crime before he may legally search, and proof beyond doubt is not within the concept of probable cause under the Fourth Amendment.

It is submitted that *probable* cause must require only *probable* continuity, not *actual* continuity of prior criminal activity. Because the court below misconstrued the Fourth

Amendment, this case should be heard to enumerate guidelines governing "staleness" to prevent future misapplications.

It is submitted that the decision in **United States v. Harris**, 482 F.2d 1115 (3d Cir. 1973), very similar on its facts to the present case, more closely reflects the proper consideration to be given to facts known to the officer, in determining probable cause under the Fourth Amendment. Considering the nature of a "large-scale narcotics operation", the *Harris* court felt that continued activity was "inherent", where present facts affirmed the conclusion. The decision of the Pennsylvania Supreme Court in this case leaves no room for considering obvious and compelling facts on the true nature of a large-scale, inter-state drug traffic scheme.

With the behavior of respondents herein, the magistrate could reasonably have *probably* concluded that respondents were using the turnpike to transport narcotics – based in part on his knowledge of their involvement in large-scale narcotics traffic less than five months before and Jacksons' federal narcotic arrest. When the conflicting statements of both respondents in an effort to cancel damaging facts and deceive the trooper are considered, together with the missing trunk key, Blue Cross card and statement that Garrett was "high", etc., the conclusion of continuity is inescapable. The magistrate should therefore not be precluded from giving the prior information weight in his evaluation of probable cause.

Reasons for Granting the Writ

II

THIS CASE PRESENTS THE COURT WITH A PRECISE FACT SITUATION TO MAKE A FULL-SCALE RECONSIDERATION OF THE DRAPER-NATHANSON-AGUILAR AND SPINELLI CASES, OR IN THE ALTERNATIVE, TO CORRECT A CLEAR MISAPPLICATION BY THE PENNSYLVANIA SUPREME COURT OF THE REQUISITE ELEMENTS OF PROBABLE CAUSE TO SEARCH WITH A WARRANT UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Pennsylvania Supreme Court in deciding this case noted:

> "Before a magistrate may issue a constitutionally valid search warrant he must be furnished with information sufficient to persuade a reasonable man that probable cause to conduct a search does exist." **Spinelli v. United States,** 393 U.S. 410, (1969), **Aguilar v. Texas,** 378 U.S. 108, (1964).

When these cases are used in a State court to penalize brilliant police work in the detection of huge amounts of heroin and cocaine, valued in the millions of dollars, it is time to re-evaluate these cases or overrule the Pennsylvania Supreme Court for its clear misapplication of the constitutional principle of probable cause to issue a search warrant.

Taken together with the interpretation problems inherent in **Draper v. United States,** 358 U.S. 307 (1959), and **Nathanson**

v. United States, 290 U.S. 41 (1933), the concurring opinion of Mr. Justice Blackman in **United States v. Harris,** 403 U.S. 573, (1971), should be noted:

> "I join the opinion of THE CHIEF JUSTICE and the judgment of the Court, but I add a personal comment in order to make very clear my posture as to Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed.2d 637 (1969), cited in several places in that opinion. I was a member of the 6-2 majority of the United States Court of Appeals for the Eighth Circuit in Spinelli v. United States, 382 F.2d 871 (1967), which this Court by a 5-3 vote reversed, with the pivotal Justice concluding his concurring opinion, 393 U.S., at 429, 89 S. Ct., at 595, by the observation that, 'Pending full-scale reconsideration of that case [Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L.Ed.2d 327 (1959)], on the one hand, or of the **Nathanson-Aguilar** cases on the other, I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an evenly divided Court." Obviously, I then felt that the Court of Appeals had correctly decided the case. Nothing this Court said in *Spinelli* convinced me to the contrary. I continue to feel today that *Spinelli* at this level was wrongly decided and, like Mr. Justice BLACK, I would overrule it."

In the current case the magistrate was able to consider the following facts:

1. As of January 1972, the Detroit Police department was in receipt of information from a reliable and confidential informant that Jackson was a large-scale narcotics dealer in the Detroit area.

2. That Jackson had been arrested by Federal authorities on narcotics charges subsequent thereto. This information was provided by the Detroit Police Department to Trooper Wynn on the date the warrant was obtained, the reliability obviously being evident to the Magistrate.

3. In January 1972, Jackson had been stopped on the Pennsylvania Turnpike traveling east with approximately $25,000 in paper currency in a paper bag.

4. The vehicle in which Jackson and Garrett were traveling westbound on the evening of the 14th of June, 1972, had been stopped in Cumberland County on the morning of the 14th traveling east.

5. Garrett claimed to have left Detroit on the 13th and to have been traveling with a female companion.

6. Jackson stated Garrett had borrowed the car to make a trip to Newark for the purpose of picking him [Jackson] up.

7. Defendant Garrett changed his story when confronted by Trooper Wynn with the fact that the passenger in the car on the morning of the 14th had been a male; Garrett stated first of all that he made the trip with a girlfriend named Ruby Smith, then changing his version of the statement and indicating that he was traveling with a male friend, Reuben Smith. Thus not only did the statement involving the occupants change, the statement with respect to the *date* of the eastbound trip changed, i.e. from June 13th to June 14th. This was *after* Garrett learned that the Trooper knew of his being stopped going eastbound the morning of the 14th.

8. Defendant Jackson stated that they had come from Detroit on the 12th of June, that he and Garrett had not made the trip together, and that Garrett could not have known the day of his travel because *he was "high"*. (emphasis added)

9. Jackson and Garrett stated that they had no knowledge of any trunk key to the vehicle.

10. Jackson and Garrett stated they had no knowledge of one Joseph Weaver, whose Blue Cross Identification Card was found in the car.

The current information obtained upon the circumstances of respondents' presence on the Pennsylvania Turnpike on both the morning and evening of June 14, 1972, ~~plus~~ the conflicting statements of both respondents in an effort to conceal damaging facts and deceive the trooper, added to the prior information as to Jackson's reputation as a large-scale narcotic dealer and his prior Federal arrest record for narcotics charges, all signaled probable cause to believe that the respondents were transporting contraband like a ten-fold beacon in the night.

Reasons for Granting the Writ

III

THIS CASE PRESENTS A PRECISE FACT SITUATION WHERE THE APPLICATION OF THE EXCLUSIONARY RULE DOES NOT DETER OUTRIGHT ILLEGAL POLICE ACTIVITY BUT PENALIZES A BRILLIANT, INNOVATIVE POLICE INVESTIGATION; THE PROPRIETY OF THE APPLICATION OF THE RULE IN SUCH A SITUATION IS SQUARELY PRESENTED.

The exclusionary rule, first announced in **Weeks v. United States,** 232 U.S. 383, (1914), and extended to the states in **Mapp v. Ohio,** 367 U.S. 643, (1961), has as its basis the deterrence of illegal police activity. Other rationales for the rule espoused from time to time are in truth superfluous. See Chief Justice Burger, dissenting, in **Bivens v. 6 Unknown Federal Narcotics Agents,** 403 U.S. 388 (1971).

It is submitted that:

(1) the rule does not serve its announced purpose, particularly in situations as here, and should be replaced with an alternative deterrent;

(2) short of replacement, the rule should be modified so as to be inapplicable in situations where it would serve no deterrent effect, present or future, and as in this case, penalizes a brilliant, innovative investigation leading to the seizure of millions of dollars worth of heroin and cocaine.

Reasons for Granting the Writ

As pointed out by Justice Black, dissenting in **Coolidge v. New Hampshire,** 403 U.S. 443 (1971), there is no language in the Fourth Amendment to support the exclusionary rule. Modification or replacement of the rule is therefore entirely proper under the Constitution.

The reasons for outright abandonment are explicitly detailed in the Chief Justice's dissent in *Bivens,* supra. This case provides a classic example of the injustice without deterrence which is fostered by the exclusionary rule, thereby providing the Court with an excellent fact situation to modify the application of the rule.

Short of replacing the rule, it should be modified so as to be inapplicable where it has no deterrent effect. In the present case, the only purpose, past, future, or present, served by the rule is to free the respondents to continue their trafficking in narcotics.

The officer herein possessed a quantum of evidence making him reasonably sure that a crime was in progress. Ignoring his beliefs would have been dereliction of his duty, hence his action in seeking a warrant was not only justified, but demanded. It must be noted that the officer did not break into the automobile trunk, but rather, respecting the rights of the respondents, sought a warrant by presenting his information to a disinterested magistrate for her evaluation. None of this is even remotely near the activities sought to be deterred by the exclusionary rule.

Thus, the exclusionary rule *will not deter* police from acting on this quantum of information in the future, for the simple reason that such actions are entirely reasonable. It is

further submitted that the rule *should not render* such searches illegal. Where police possessed with this much evidence cannot act, even through warrants, their ability to effectively enforce the law is unreasonably and unnecessarily restricted.

The value of the exclusionary rule – deterrence of illegal police activity – is not exemplified by this case. It is submitted that the Pennsylvania Supreme Court has lost sight of the sole rational supporting the rule. The court should therefore utilize this case to redefine the rule to serve the needs of justice and the protection of the public.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Edgar B. Bayley
First Assistant District Attorney
Cumberland County, Pennsylvania
Attorney for Petitioner

APPENDIX A

[_____ Pa. _____, 337 A.2d 582 (1975)]

IN THE SUPREME COURT OF
PENNSYLVANIA
Middle District

No. 47 January Term, 1975

COMMONWEALTH OF PENNSYLVANIA

Appellee

V.

EDDIE JACKSON and RONALD GARRETT

Appellants

Appeals from the Orders of the Superior Court at Nos. 68 and 69 October Term 1974, Affirming the Judgments of Sentence of the Court of Common Pleas of Cumberland County to No. 285 September Term 1972.

May 13, 1975

Appendix A

OPINION

EAGEN, J.

Appellants, Eddie Jackson and Ronald Garrett, were arrested and charged with unlawful possession of a controlled substance, unlawful possession with intent to deliver dangerous drugs and conspiracy to commit an unlawful act.[1] A search, pursuant to a warrant, of the trunk of a 1972 Ford Thunderbird in which the appellants had been traveling, revealed a box containing approximately fifteen pounds of heroin and cocaine. A pretrial motion to suppress this evidence was filed and, after an evidentiary hearing, denied. Thereafter, appellants were tried before a judge, sitting without a jury, and adjudged guilty of the charges. The challenged evidence was introduced against the appellants at trial. Post trial motions were denied and a sentence of five to fifteen years imprisonment, plus the payment of a $10,000 fine was imposed on each appellant. On appeal, the Superior Court affirmed the judgments of sentence in separate per curiam orders. We then granted allocatur.

The record discloses the following:

On June 14, 1972, at approximately 6:00 p.m., Trooper George Wynn of the Pennsylvania State Police stopped a Ford

[1] The Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, P.L. 165, No. 64, § 13, 35 P. S. § 780-113 (Supp. 1974-1975).

Thunderbird automobile traveling west on the Pennsylvania Turnpike for a speeding violation.[2] The driver, appellant Jackson, produced an operator's license issued to Eddie Jackson of Detroit, Michigan, and a Michigan registration for the vehicle in the name of Teresa Brown of Detroit, Michigan. The appellant Garrett was the vehicle's sole passenger. The officer advised Jackson he would be arrested for speeding and asked him to exit the vehicle. The two then proceeded to the officer's police patrol automobile nearby and Garrett remained in the Ford.

While seated in the police vehicle, Trooper Wynn immediately advised Jackson of his rights as mandated by **Miranda v. Arizona,** 384 U.S. 436, 86 S. Ct. 1602 (1966). The officer then went on to tell Jackson that he "suspected him of transporting large quantities of heroin across Pennsylvania . . . " because he "was familiar with his [Jackson's] stop on the 21st of January, 1972, at which time he had a brown paper bag containing $25,000 in U.S. paper currency" and that on the 21st day of January, 1972, Trooper Wynn "was made aware of information from Detroit . . . that he [Jackson] was a large narcotic dealer in the Detroit area" who used the Pennsylvania Turnpike to transport large quantities of heroin. During the course of this conversation, Jackson said nothing incriminating, but told Trooper Wynn he was traveling from Newark, New Jersey, and had left Detroit on Monday, June 12th.

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[2] The vehicle had been stopped earlier the same day while traveling east on the turnpike.

Trooper Wynn then returned to the Ford automobile and advised Garrett of his *Miranda* rights. Garrett stated he understood his rights and, upon questioning, informed Trooper Wynn that he and Jackson were traveling from Newark, New Jersey, and had departed from Detroit on Tuesday, June 13th. When confronted with this apparently contradictory statement, Jackson stated that Garrett was "high" and probably unaware what day it was. Subsequently, a search of the interior of the Ford automobile was conducted by Trooper Wynn and Trooper Glunt, who had arrived on the scene.[3] The troopers discovered a Blue Cross identification card issued in the name of Joseph Weaver, an individual whom Jackson and Garrett denied having any knowledge of. In addition, the troopers discovered that the trunk key was not present with the ignition key and, when Jackson and Garrett claimed to have no knowledge of the trunk key, a decision was made to transport them, as well as the Ford automobile, to the State Police barracks in Newville, Cumberland County.

Enroute to the State Police barracks, Garrett stated he had traveled to Newark, in the Ford automobile, with a girl friend named Ruby Smith. However, upon being advised by Trooper Wynn that the same vehicle had been stopped earlier in the day for speeding on the turnpike and that the arresting officer had reported the occupants of the vehicle to be two males, Garrett changed his story. He explained that Trooper Wynn had

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[3] The suppression hearing court determined that Jackson had "voluntarily and intelligently" consented to this search. The appellants contest this determination and assert that any claimed consent was obtained only as the result of the troopers' claim of lawful authority to go through the vehicle. In view of our disposition of this case it is not necessary to now reach this issue.

misunderstood his first statement and that his traveling companion had been Reuben Smith.

Following arrival at the State Police barracks, Trooper Wynn obtained a warrant to search the trunk of the Ford automobile for "Narcotics, Controlled Substances, and Stolen Articles." The affidavit in support of the issuance of the warrant recounted the events which transpired on June 14th, namely: (1) the stopping of the Ford autombile for speeding on two occasions; (2) the inconsistent and contradictory statements given by Jackson and Garrett; (3) the absence of a trunk key and the failure of Jackson and Garrett to know the whereabouts of such key; and (4) the discovery in the interior of the vehicle, of a Blue Cross identification card issued to Joseph Weaver, an individual whom both Jackson and Garrett denied having any knowledge of. In addition, the affidavit related: (1) that on *January 21, 1972,* Jackson had been stopped for speeding while traveling east on the Pennsylvania Turnpike and a brown paper bag containing twenty-five thousand dollars in cash was found in his possession; (2) that as of *January 21, 1972,* the Detroit Police Department was in receipt of information from a "reliable confidential informant" that Jackson was a large scale narcotics dealer in the Detroit area; and (3) that shortly after *January 21, 1972,* Jackson and Garrett were arrested by federal authorities on narcotics charges. The subsequent search produced the heroin and cocaine which were eventually introduced into evidence at trial.

Appellants contend the warrant which authorized the search was constitutionally defective, in that it was issued without a showing of probable cause and, thus, renders the

evidentiary use of the property seized in the execution of the warrant as constitutionally proscribed at trial. We agree.

Before a magistrate may issue a constitutionally valid search warrant he must be furnished with information sufficient to persuade a reasonable man that probable cause to conduct a search does exist. **Spinelli v. United States,** 393 U.S. 410, 89 S. Ct. 584 (1969); **Aguilar v. Texas,** 378 U.S. 108, 84 S. Ct. 1509 (1964); **Commonwealth v. D'Angelo,** 437 Pa. 331, 263 A. 2d 441 (1970). The requisite probable cause must exist at the time the warrant is issued and be based on facts which are closely related in time to the date of the issuance, for it is well-settled that stale information cannot supply the probable cause necessary for the issuance of a search warrant. **Sgro v. United States,** 287 U.S. 206, 210, 53 S. Ct. 138 (1932); **Commonwealth v. Eazer,** 455 Pa. 320, 323, 312 A. 2d 398 (1973); **Commonwealth v. Simmons,** 450 Pa. 624, 629-630, 301 A. 2d 819 (1973); **Commonwealth v. Shaw,** 444 Pa. 110, 113, 281 A. 2d 897 (1971).

Instantly, the only information contained in the affidavit relating to the possible presence of narcotics or other controlled substances in the trunk of the Ford automobile, dated from January 21, 1972, almost five months prior to the issuance of the search warrant. As this Court noted in **Commonwealth v. Shaw,** supra at 113-114, 281 A. 2d at 899:

> "If the issuing officer is presented with evidence of criminal activity at some prior time, this will not support a finding of probable cause as of the date the warrant issues, *unless it is also shown that the criminal activity continued up to or about that time.*" [Emphasis supplied.]

Here, as in *Shaw*, the requirement of establishing continuing criminal activity has not been satisfied. See also **Commonwealth v. Simmons**, supra.

The Commonwealth argues the furtive behavior of the appellants, when considered with the reports of past criminal narcotic activity, dictated the probability that, on June 14th, the appellants were using the Pennsylvania Turnpike for the transportation of narcotics, thus supplying the required element of continuity. However, evidence to demonstrate continued criminal activity must establish *actual* continuity of the illegal enterprise. **Commonwealth v. Eazer**, supra at 324, 312 A. 2d at 400. Herein, Trooper Wynn possessed no information that a crime had been committed. He had neither an informant's tip nor the benefit of police surveillance to indicate that narcotics were being transported in the Ford vehicle. Although the appellants' behavior may not have been of an outwardly innocent character, it was not such as indicated a probability that narcotics would be found in the Ford automobile. The appellants' responses and movements may have appeared suspicious to Trooper Wynn, but "mere suspicion" is not an adequate ground for the issuance of a search warrant. **Nathanson v. United States**, 290 U.S. 41, 47, 54 S. Ct. 11 (1933); **United States v. Day**, 455 F. 2d 454, 456 (3d Cir. 1972); **Commonwealth v. Pinno**, 433 Pa. 1, 5, 248 A. 2d 26 (1968). Therefore, we conclude there did not exist probable cause to search the trunk of the Ford automobile for narcotics and controlled substances.

The Commonwealth contends that, even if probable cause did not exist to justify a search for narcotics, there was probable cause to search the trunk of the automobile for stolen

goods, and since the presence of the narcotics was disclosed through this search, this contraband was properly seized under the "plain view" doctrine set forth in **Coolidge v. New Hampshire,** 403 U.S. 443, 465, 91 S. Ct. 2022 (1971). We find this position to be devoid of merit.

Fundamental to the application of the "plain view" doctrine is the principle that the seized objects must not have been put in plain view as a result of unlawful police conduct. **Harris v. New York,** 390 U.S. 234, 236, 88 S. Ct. 992 (1968); **Commonwealth v. Jeffries,** 454 Pa. 320, 327, 311 A. 2d 914 (1973). Instantly, probable cause to search the trunk for stolen goods did not exist. The sole indication that stolen goods might be found in the trunk of the Ford automobile was the discovery of an unexplained Blue Cross identification card in the interior of the vehicle. Trooper Wynn possessed no information indicating the Blue Cross card had been stolen, nor was he in possession of knowledge indicating the appellants were transporting stolen goods. Under these circumstances, the mere discovery of an unexplained Blue Cross identification card, in a *borrowed* vehicle, did not justify the police in believing that fruits of criminal activity would be found upon an inspection of the trunk. **Commonwealth v. Carrington,** 227 Pa. Superior Ct. 472, 324 A. 2d 531 (1974), relied upon by the Commonwealth to support the validity of the search on this theory is decidedly different factually. Therein the automobile occupied by Carrington and others had been reported to the police as stolen and had in plain view, on the front seat, when stopped by the police, a can containing three plastic bags of white powder.

The orders of the Superior Court are reversed. The judgments of sentence of the court of original jurisdiction are reversed and a new trial is ordered.

Mr. Chief Justice Jones dissents.

APPENDIX B

[228 Pa. Superior Ct. 885, 322 A.2d 680 (1974)]

IN THE SUPERIOR COURT OF
PENNSYLVANIA
Middle District

Nos. 68 and 69 October Term, 1974

COMMONWEALTH OF PENNSYLVANIA

v.

Eddie Jackson,

Appellant

COMMONWEALTH OF PENNSYLVANIA

v.

Eddie Jackson (et al, appellant)
Ronald Garrett

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal, of Cumberland County, at No. 285 September Term, 1972.

Appendix B

OPINION

PER CURIAM.

Judgment of sentence affirmed on the opinion of Shughart, President Judge, of the court below.

APPENDIX C

[23 Cumberland Law Journal 34]

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 285 September Term, 1972

COMMONWEALTH OF PENNSYLVANIA

v.

EDDIE JACKSON
RONALD GARRETT

OPINION and ORDER OF COURT

The above-named defendants were stopped by the Pennsylvania State Police on the Pennsylvania Turnpike for speeding. Following an alleged consensual search of the motor vehicle, the police officers procured a search warrant for the car which resulted in the seizure of a quantity of narcotic drugs. As a result of the testimony introduced at the suppression hearings, we make the following findings of fact.

Appendix C

FINDINGS OF FACT

1. At approximately 6:00 p.m. on June 14, 1972, Trooper George Wynn of the Pennsylvania State Police stopped a Thunderbird automobile traveling west on the Pennsylvania Turnpike for a speeding violation (N.T. 4, 5).

2. The vehicle was registered in the name of Teresa Brown of Detroit, Michigan, and was being operated by Eddie Jackson who was accompanied by a passenger, Ronald Garrett (N.T. 6, 7).

3. Upon being stopped, Jackson was removed to the patrol car where Officer Wynn stated that he had information dating from January 1972 which indicated that Jackson was a known narcotics dealer and that Wynn planned to make a search of the vehicle by the use of a search warrant (N.T. 7, 8, 22-24).

4. At the same time, Wynn advised Jackson of his Miranda rights and of his right to refuse a warrantless search of the vehicle at which time Jackson indicated that he understood his rights (N.T. 8).

5. Jackson advised Wynn that he had left Detroit on Monday, June 12, 1972, and was returning to Detroit from Newark, New Jersey (N.T. 8, 9).

6. Wynn returned to the Thunderbird and advised Garrett of his Miranda rights. Garrett stated that he understood his rights and, upon questioning, advised Wynn that he and Jackson were traveling from Newark, New Jersey, and had left Detroit on Tuesday, June 13, 1972 (N.T. 9).

7. Wynn confronted Jackson with Garrett's contradictory statement and Jackson stated that Garrett was incorrect and that he, Jackson, had not been on the Pennsylvania Turnpike in the Thunderbird at any time (N.T. 10, 35, 36).

8. Upon request of Trooper Wynn, Jackson consented to a search of the Thunderbird stating that he had nothing to hide (N.T. 10, 26, 27, 31, 32).

9. Trooper Glunt of the Pennsylvania State Police arrived and, pursuant to request from Trooper Wynn, together they conducted a search of the interior of the Thunderbird which produced a Blue Cross identification card issued in the name of Joseph Weaver (N.T. 10, 11).

10. The troopers discovered that the trunk key was not present with the ignition key and both defendents denied any knowledge of its whereabouts (N.T. 11).

11. At this point, the defendents were informed that they would be detained for the purpose of obtaining a search warrant (N.T. 11, 33).

12. Garrett and Jackson were transported to the Newville State Police Barracks by Trooper Wynn while Trooper Glunt drove the Thunderbird to that location (N.T. 11).

13. Enroute to the Newville Barracks, Garrett advised Wynn that he had borrowed the Thunderbird from a girlfriend named Ruby Smith whom he had left in Newark. Upon being advised by Wynn that the same vehicle had been stopped for speeding on the turnpike on the morning of June 14, 1972, and that the arresting officer reported the occupants of the car to be

two negro males, Garrett stated that Wynn had misunderstood his first statement and that his traveling companion was one Reuben Smith, a male companion (N.T. 11, 12, 13).

14. At the Newville Barracks, Jackson made a call ostensibly to his attorney and then revoked his original permission to search the vehicle. At this time, Trooper Wynn called the Detroit Police Department and received confirmation of information previously received on January 21, 1972, to the effect that Jackson was a large-scale narcotics dealer and that he was arrested by federal authorities in a narcotics raid in Detroit (N.T. 26, 29, 33-35, 53, 59, 60).

15. Jackson and Garrett were escorted by the police officers to the office of District Justice Esther Cohick in Newville where Jackson pled guilty and paid the fine for the speeding violation (N.T. (2) 4).*

16. Trooper Wynn next typed his complaint for a search warrant, during which Jackson's attorney, Milton Henry, Esquire, called District Justice Cohick on several occasions inquiring about the search warrant (N.T. 63, 64; N.T.(2) 5-7).

17. Trooper Wynn talked to Milton Henry on the phone who identified himself as Jackson's attorney but the officer refused to discuss the case and finally referred Mr. Henry to the district attorney of Cumberland County (N.T. 44, 45, 47, 62, 63).

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*Page numbers following "N.T.(2)" refer to notes of testimony from the second suppression hearing on October 10, 1972; other page numbers refer to the first suppression hearing on September 6, 1972.

18. After examination of the sworn complaint, District Justice Cohick issued a search warrant (N.T.(2) 8).

19. At no time prior to the issuance of the search warrant did District Justice Cohick have any communication with the district attorney of Cumberland County or any member of his staff concerning the case (N.T.(2) 4, 9).

20. Trooper Wynn did not confer or communicate with the district attorney or any member of his staff concerning the case on the evening of June 14, 1972, until after the search warrant had been issued by District Justice Cohick. Further, Trooper Wynn and District Justice Cohick had no discussion regarding the district attorney or assistant district attorney concerning the case or the issuance of the warrant prior to the time the warrant was issued (N.T.(2) 6, 7, 9, 10, 18, 24).

21. After the warrant was issued, the police officers and the defendants returned to the Newville Barracks where the trunk of the vehicle was searched by removing the rear seat of the vehicle (N.T. 18).

22. The search produced a brown sealed cardboard box containing eight clear plastic bags containing suspected narcotics, Detroit Edison electrical statements in the name of French Continental Realty Company, and a white slip of paper with red numerical figures.

23. Following the seizure of the suspected contraband, Jackson and Garrett were arrested for possession of contraband and were taken to District Justice Cohick's office for preliminary arraignment.

24. On September 2, 1972, Trooper Wynn conducted a further search of police patrol car No. 360 which was used to transport the defendants on the evening of June 14, 1972, and under the back seat of that vehicle he discovered a Ford Motor Company trunk key which he subsequently found would open both the trunk and the glove compartment of the Thunderbird which had been in police custody since June 14, 1972.

DISCUSSION

The first question for consideration is whether the warrantless search of the interior of the vehicle on the evening of June 14, 1972, was valid. The validity of the search hinges on whether or not Jackson consented to the search. It is clear that "a waiver is ordinarily an intentional relinquishment of a known right or privilege." **Johnson v. Zerbst,** 304 US 458, 464 (1938), 82 L Ed 1461, 1466. An individual may personally waive the constitutional right prohibiting unreasonable searches. **Commonwealth v. Smith,** 201 Pa. Superior Ct. 511 (1963), (citing cases). Further, when a waiver or right is involved, the prosecutor has the burden of showing voluntary consent and "this burden cannot be discharged by showing no more than acquiesence to a claim of lawful authority." **Bumper v. North Carolina,** 391 US 543, 88 S Ct 1788, 20 L ed 2d 797, 802 (1968). In the Bumper case, the police secured admission to a residence by deceitfully stating that they had a search warrant in their possession. The court therefore held that their misrepresentation invalidated the search. There is no claim of alleged lawful authority involved in the case before us.

The Pennsylvania Supreme Court has held that for consensual search to be valid, "there must be a total absence of duress or coercion, express or implied." **Commonwealth v.**

Harris, 429 Pa. 215 (1968). The implied coercion has been defined as "stealth, deceit, or misrepresentation." **Commonwealth v. Wright**, 411 Pa. 81 (1963). Consent or waiver is valid, however, if obtained under a threat to obtain a search warrant. **Commonwealth v. Wright**, supra; **United States v. Haas**, 106 F Supp 295 (1952).

Further criteria for determining voluntary waiver have been established in **United States ex rel. Harris v. Hendricks**, 423 F 2d 1096 (3d Cir 1970), where the court said at page 1009:

> It is settled that "the existence and voluntariness of a consent is a question of fact" to be decided in light of the attendant circumstances by the trier of facts. Critical factors of attendant circumstances include the setting in which the consent was obtained, what was said and done by the parties present with particular emphasis on what was said by the individual consenting to the search, and his age, intelligence, and educational background. (Footnotes omitted.)

In this case there is no evidence that the officers obtained Jackson's permission through a claim of authority or through the use of coercion or duress. Trooper Wynn advised Jackson that he had no authority to make the search without a warrant and Jackson clearly indicated that he understood his right to refuse. We are satisfied that Jackson freely consented to the search and there is nothing to negate a finding that his waiver was voluntarily and intelligently given. We conclude, therefore, that the Blue Cross I.D. card obtained in the search of the car was properly secured and therefore could be used as one of the grounds for securing a search warrant.

Appendix C

The defendants earnestly contend that one who is carrying contraband would assuredly not voluntarily consent to a search which would disclose those articles, citing **United States v. Gregory**, 204 F Supp 884 (D.C.N.Y. 1962). The reasoning of the court in that case, however, is inapplicable to this situation. Here, the defendants knew that the key to the trunk of the vehicle was not available and therefore the contraband in the trunk could not be uncovered by the search. By voluntarily

The defendants earnestly contend that one who is carrying contraband would assuredly not voluntarily consent to a search which would disclose those articles, citing **United States v. Gregory**, 204 F Supp 884 (D.C.N.Y. 1962). The reasoning of the court in that case, however, is inapplicable to this situation. Here, the defendants knew that the key to the trunk of the vehicle was not available and therefore the contraband in the trunk could not be uncovered by the search. By voluntarily consenting to the search of the rest of the car which produced no contraband, the defendants had every reason to expect that the officers would be satisfied and permit them to go on their way. The consent to search in this situation might therefore be considered as a means of avoiding discovery of the contraband. The consent is no less valid because the ploy was unsuccessful.

Having decided that the seizure of the Blue Cross I.D. card resulted from a consensual search, we next turn to a determination of whether the narcotics were seized pursuant to a valid search warrant. For a search warrant to be valid, the issuing officer must have been able to find probable cause from the facts and circumstances as presented in the sworn affidavit. **Nathanson v. United States**, 290 U.S. 41, 54 S Ct 11, 78 L ed 159 (1933). An affidavit, however, does

not establish probable cause when it merely states the affiant's suspicions or beliefs without stating facts upon which the belief is based. **Nathanson v. United States,** supra.

On the other hand, the decision as to whether a complaint for search warrant establishes probable cause is made in a commonsense and realistic manner and not upon legal technicalities. **United States v. Ventresca,** 380 U.S. 102, 13 L ed 2d 684, 85 S Ct 741 (1965). Further, reviewing courts will pay great deference to a magistrate's determination that probable cause does exist. **Jones v. United States,** 362 U.S. 257, 4 L ed 2d 697, 90 S Ct 725 (1960). This principle was enuciated in **Aguilar v. Texas,** 378 U.S. 108, 111, 12 L ed 2d 723, 726, 84 S Ct 1509 (1964), where it was said:

> . . . When a search is based upon a magistrate's, rather than a police officer's determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant" and *will sustain the judicial determination so long as "there is a substantial basis for (the magistrate) to conclude that narcotics were probably present."* (Emphasis added.) (Citations omitted.)

Nonetheless, the decision that probable cause exists may not be arbitrarily made, and the facts from which probable cause is determined must be closely related in time to the issuance of the warrant. **Commonwealth v. Shaw,** 444 Pa. 110, 113 (1971). In that case, Justice Eagen stated at page 113:

> If the issuing officer is presented with evidence of criminal

activity at some prior time, this will not support a finding of probable cause *unless it is also shown that the criminal activity continued up to or about that time.* (Emphasis added.)

A warrant may be valid even when the affidavit contains extraneous or impermissible information if the matter is merely cumulative and probable cause exists independent of the impermissible facts contained therein. **United States v. Sterling,** 369 F 2d 799 (3d Cir 1966); **Commonwealth v. Thomas,** 444 Pa. 436 (1971).

Considering the above principles, it is apparent that there was a substantial basis for the issuance of the warrant either (1) based upon the facts set forth in the affidavit which were closely related in time to the issuance of the warrant, or (2) based upon all of the facts as stated since they reasonably display that the original criminal activity continued up to that time.

Ignoring the information compiled prior to June 24, 1972, the following facts are set forth in the affidavit: (1) the vehicle in question was stopped for speeding two times on the same day, once traveling east on the Pennsylvania Turnpike and once traveling west; (2) the occupants gave conflicting statements as to the dates of travel and as to who had been in the vehicle on the earlier occasion, all of which was irrelevant to the speeding charge; (3) the car had purportedly been borrowed by Garrett and he did not know either the name or address of the owner; (4) a Blue Cross I.D. card which was issued to one Joseph Weaver who was unknown by either occupant was found in the car and; finally, (5) the fact that, although allegedly the parties

had traveled across the Pennsylvania Turnpike to Newark and on their way back, neither occupant admitted knowledge of the whereabouts of the key to the trunk in which a spare tire would be located.

While the fact that the same automobile was stopped twice for speeding on the same day going in opposite directions *may* arouse suspicion, the fact that the occupants made conflicting statements regarding their travels *was* suspicious. See **Commonwealth v. Beatty,** 216 Pa. Superior Ct. 144 (1971). That the occupants would make a long journey in a borrowed car without having access to the trunk or having off-hand knowledge of the owner, when combined with the other circumstances, leads to a justifiable conclusion that some illegal activity is afoot. Therefore, the discovery of the unexplained Blue Cross I.D. card issued to one unknown to either of the occupants, combined with these circumstances, provides a substantial basis for concluding that stolen credit cards and I.D. cards were probably in the trunk of the automobile. The totality of the circumstances were such as to lead to a reasonable conclusion that the trunk might contain other stolen identification or credit cards.

Even if probable cause did not exist to justify a search for narcotics, when narcotics were found during a reasonable search for stolen goods, the narcotics became subject to seizure under the "plain view rule" enunciated in **Coolidge v. New Hampshire,** 403 US 443, 465, 29 L ed 2d 564, 582 (1971), where the court said at page 465:

> An example of the applicability of the "plain view" doctrine is the situation in which police have a warrant to

search a given area for specific objects, and in the course of the search come across some other article of incriminating character. (Citations omitted.)

Even though we believe that probable cause did exist for the issuance of the search warrant without regard to the information on Jackson dating back to January 21, 1972, we are satisfied that the circumstances occurring on June 14, 1972, were so similar in nature to those prevously recorded that the magistrate issuing the warrant would be justified in considering all of the facts set forth.

The complaint for the warrant stated that: (1) a "reliable confidential informant" had given the Detroit police information that Jackson was a large-scale narcotics dealer; (2) the affiant had previous knowledge of Jackson's connection with narcotics trafficking in Detroit; and (3) the affiant knew Jackson had been arrested for a speeding violation on the Pennsylvania Turnpike on January 21, 1972, with $25,000 in cash in his possession.

The implication of this information is that the defendants had a route whereby they transported narcotics from New Jersey to Detroit. Therefore, although in and of itself this previously gathered information would have been stale, when examined in light of the circumstances occurring on June 14, 1972, a pattern of continuous criminal activity is displayed. Thus, the previous information could be utilized in determining whether probable cause existed for the issuance of a search warrant.

This situation is distinguishable from **Commonwealth v.**

Shaw, supra, for in that case the only fact connecting the previously gathered information to the present circumstances was the presence of visitors with long hair and unusual clothing. Logically, there could not be an inference of criminal activity from that circumstance alone. In this case, however, as indicated, there are several clearly suspicious circumstances which, when coupled with previously gathered information, form a pattern of activity. We conclude that even had probable cause for the issuance of the warrant not existed apart from the material which was five months old, there is sufficient connection between the activities of the defendants on the two occasions to provide a substantial basis for the issuance of the warrant.

The defendants have also moved to suppress the trunk key found by Trooper Wynn in the patrol car on September 2, 1972, on grounds that the key is the result of an illegal search and seizure. In accordance with the prior findings that the warrantless search was properly consented to and that the warrant was properly issued, this motion must be denied.

Further, the Thunderbird was being properly held under authority of the Controlled Substance, Drug, Device, and Cosmetic Act, Act of April 14, 1972 (35 P.S. 780-101 et seq.) which was in effect on the date of defendant's arrest. The police have the right to search vehicles properly held under the provisions of a state statute. **Cooper v. California,** 386 US 58, 17 L ed 2d 730, 87 S Ct 788 (1967). Thus, both the discovery of the key and its use to open the trunk and glove compartment of the Thunderbird are admissible as evidence.

Since we regard the alleged statement of Jackson that "you

got us now" as being too ambiguous to be admissible in evidence, the motion to suppress this statement is sustained.

Therefore, except as noted above, we conclude that both the original and amended motions to suppress the evidence must be overruled.

ORDER OF COURT

AND NOW, November 29, 1972, for the reasons set forth above, the motions to suppress the evidence adduced in the above case be and are hereby overruled, except as to the oral statement of the defendant Jackson.

By the Court,

/s/ Dale F. Shughart

P.J.

APPENDIX D

[24 Cumberland Law Journal 59]

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 285 September Term, 1972

COMMONWEALTH OF PENNSYLVANIA

v.

EDDIE JACKSON
RONALD GARRETT

OPINION and ORDER OF COURT

On June 14, 1972, a vehicle driven by the defendant Eddie Jackson, in which Ronald Garrett was a passenger, was stopped on the Pennsylvania Turnpike for a speeding violation by Trooper George A. Wynn of the Pennsylvania State Police. Based on the information he had previously received, the arresting officer believed the defendants were transporting

narcotics and therefore conducted an investigation which ultimately led to the seizure of a large quantity of heroin and cocaine from the trunk of the vehicle pursuant to a search warrant. The defendants were then arrested and a criminal complaint was filed.

A preliminary hearing was held on June 29, 1972, at which the two defendants were charged with possession of heroin, possession with intent to deliver heorin, possession with intent to deliver cocaine, and conspiracy to commit an unlawful act. The defendants were bound over to the court and were subsequently indicted by a grand jury on all charges. The defendants filed timely motions to suppress all evidence and hearings on these motions were held on September 6, 1972, and October 10, 1972. An order of court and opinion containing specific findings of fact, which overruled the defendants' motions, was filed on November 29, 1972. Evidence of an allegedly inculpatory statement by the defendant Jackson was suppressed.

The defendants waived a jury trial and were tired before the writer on February 28, 1973. Both defendants were found guilty on all charges. The defendants then filed post-trial motions for new trial and in arrest of judgment, asserting that the evidence which they had previously moved to suppress was unlawfully obtained and therefore should not have been admitted at the trial. Additionally, they contended that (1) even if the evidence was admissible, it was not sufficient to support a conviction on any of the charges; (2) the unavailability at trial of the box in which the narcotics were found was an unlawful suppression of exculpatory evidence by the prosecution; and (3) because the narcotics which the police

confiscated were in the process of interstate transportation, a state prosecution could not be sustained.

We feel that the issues and facts relevant to the seizure of the evidence introduced by the Commonwealth at trial were adequately set forth in the opinion filed with the court order overruling the motion to suppress. That opinion is part of the record of the case and those matters will not be re-evaluated here. The recent cases of **Schneckloth v. Bustamonte,** _____ U.S. _____, 93 S. Ct. _____, 36 L. Ed. 2d 854 (1973), and **Commonwealth v. Mamon**, 449 Pa. 249 (1972), support our original conclusion of the legality of the consensual search of the interior of the car which produced the Blue Cross I.D. card issued to Joseph Weaver. Since the search warrant was in part issued in a reasonable belief that stolen credit cards were being transported in the vehicle, it is also important to note that the Blue Corss card is a *standard type credit card* made of plastic with the name and account number offset from the surface.

Additionally, the defendants have renewed the contention that the statements made by the defendants when questioned by Trooper Wynn at the scene of the arrest and enroute to the police barracks were unlawfully elicited. We did not deal specifically with this issue in the opinion on the motion to suppress because we did not feel the contention merited discussion. At this time it is sufficient to say that the prosecution proved at the hearing that the defendants were fully informed of their *Miranda* rights and that they indicated an understanding of the rights (i.e., to remain silent and to have the assistance of counsel before answering any questions). There is no indication that the defendants have any deficiency of age

or intelligence or difficulty understanding the English language which might have precluded their fully understanding these rights. They freely, voluntarily, and intelligently chose to answer the questions without the assistance of counsel and those statements were therefore admissible in evidence. **Miranda v. Arizona,** 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 726 (1966). Also see **Commonwealth v. Jefferson,** 445 Pa. 1 (1971).

We will now summarize the evidence presented at trial to determine whether that evidence is sufficient to support the convictions. The evidence will be reviewed in the light most favorable to the Commonwealth. **Commonwealth v. Powell,** 449 Pa. 126 (1972).

At approximately 6:00 p.m. on the evening of June 14, 1972, a blue Ford Thunderbird automobile with a Michigan registration plate was stopped by Trooper Wynn for a speeding violation. The vehicle was going 90 miles per hour in a 65-mile-per-hour zone and was traveling westbound on the Pennsylvania Turnpike in Cumberland County. The driver of the vehicle was determined to be Eddie Jackson and his only passenger was Ronald Garrett. The vehicle was registered in the name of Theresa Brown of Detroit, Michigan. This same vehicle had been stopped for a speeding violation at 8:17 a.m. of the same day by Trooper Harry F. Moyer of the State Police when it was traveling eastbound of the Pennsylvania Turnpike in Cumberland County. Ronald Garrett was driving the vehicle at that time and Eddie Jackson was his only passenger. Trooper Wynn had knowledge of this arrest when he stopped the vehicle.

After Trooper Wynn had stopped the vehicle on the evening

of June 14, he had Jackson sit in the police car while the citation was issued. Garrett remained seated in the Thunderbird. While in the patrol car, Jackson told Wynn that he was coming from Newark, New Jersey, but had originally left Detroit that morning. Wynn then walked to the Thunderbird and spoke to Garrett who informed the officer that he (Garrett) had left Detroit on Tuesday, June 13 (the day before), and was returning there from Newark. When Wynn confronted Jackson with Garrett's conflicting statement, Jackson replied that Garrett was high and did not know what was "going on." Wynn then requested and obtained permission to search the vehicle and called Trooper Glunt of the State Police to the scene to assist in the search.

Wynn noticed that the key ring upon which the ignition key was hanging did not have a trunk key on it. Both defendants denied any knowledge of a trunk key. The search of the interior of the vehicle ensued and produced a Blue Cross credit card issued to Joseph Weaver of whom neither defendant professed any knowledge (Commonwealth Ex. 1). No trunk key was located. Wynn then notified the defendants that he was going to try to get a warrant to search the trunk. The defendants were then placed in the patrol vehicle and taken to the police barracks by Wynn. Glunt drove the defendants' car to that location.

Before being placed in the police car, the defendants were searched for weapons. No weapons, trunk key, or other evidence was found during the search. While enroute from the turnpike to the police barracks, Garrett told Trooper Wynn that he had made the trip from Detroit to Neward with Ruby Smith, a female companion. Wynn then stated that he had been

informed that Garrett was given a speeding ticket that morning and that his companion was male. Garrett then stated that his companion was a male named Ruben Smith and that Wynn had misunderstood his previous statement.

Wynn obtained a search warrant from district justice of the peace Cohick and returned to the police barracks to search the vehicle. Ready access could not be gained to the trunk and the rear seat of the vehicle had to be removed to conduct the search. In the trunk was a sealed cardboard box which was too large to remove through the rear seat opening and was therefore slit down the sides so the contents could be removed. The box had no discernible writing, printing, or address on it but was not available at trial because of its inadvertent loss or destruction by the police.

Among the contents of the box were five clear plastic bags containing a white powder and three smaller wrapped packages containing a white powder (Commonwealth Ex. 2). These items were seized and placed in the police evidence locker by Wynn and remained there until later taken by him to the police crime laboratory and presented to James L. Miller, a chemist employed there. Miller took random samples from each bag (Commonwealth Ex. 7), each of which were marked to indicate their origin. He then chemically analyzed the samples in accordance with proper scientific procedures and found the five samples from the large plastic bags to be heroin and the three samples from the smaller packages to be cocaine.

Wynn testified that he had weighed the bags containing the narcotics and found the total weight to be approximately 15 pounds. Ronald L. Prough, State Police Narcotics Coordinator

and Supervisor of Undercover Details, testified that the heroin and cocaine, when cut, would have an estimated street value of $6.8 million.

The Commonwealth also attempted to introduce into evidence a key found in the patrol car which transported the defendants on the night of their arrest. The key was discovered almost three months after the arrest but was found to open the trunk of the defendants' car. The defendants contend that the refusal of the court to admit the key in evidence at trial was not in accordance with finding of fact #24 of the suppression opinion and was therefore prejudicial. This reasoning is specious. As a result of the suppression hearing, the key was found to have been legally seized and used to open the trunk. At trial the defendants objected to the Commonwealth's attempt to have the key admitted. The objection was sustained and the key was not admitted in evidence because the lapse of time between the defendants' arrest and the discovery of the key rendered it too remote to be considered incriminating to the defendants. The defendants were therefore belatedly granted the relief prayed for in the suppression hearing. It is impossible to see how they could have been injured by the action of the court in refusing to admit it into evidence.

I. SUFFICIENCY OF THE EVIDENCE.

To determine whether the evidence presented by the Commonwealth was sufficient to support the verdicts, it is of prime importance to establish the standard of proof necessary to support a conviction for the possession of narcotics. Our courts have accepted the definition of "possession" as "power of control and intent to control" as set forth in **United States v.**

Curzio, 170 F. 2d 354 (3d Cir. 1948), for cases of both illegal firearms and narcotics possession. **Commonwealth v. Armstead,** 452 Pa. 49 (1973); **Commonwealth v. Townsend,** 428 Pa. 281 (1968); **Commonwealth v. Yaple,** 217 Pa. Superior Ct. 232 (1970); **Commonwealth v. Pinckney,** 194 Pa. Superior Ct. 371 (1961). Under this rule it is necessary to prove that the person charged with possession of an illegal object knew the object was in his possession. **Commonwealth v. Armstead,** supra.

The difficulty with the Pennsylvania rule is that there is an apparent lack of any judicial definition of "power of control" or "intent to control" regarding narcotics possession. "Power of control" may be narrowly construed to mean the ability to exert actual physical dominance over an object, or might be broadly construed to mean nerely an ability to exert an influence over the object. The restrictiveness of the former definition is readily seen by examining the instand case. The defendants were apprehended in the process of transporting $6.8 million worth of narcotics, but were not proved to have a ready means of reducing the contraband to physical control. If they knew that contraband was present, however, they certainly were in actual control of it even though they were perhaps not readily able to reduce it to physical control. We therefore consider the broader definition as being the proper guideline for the determination of narcotics possession.

"Intent to control" can also be construed either narrowly or broadly. It may be restrictively construed to mean a desire to illegally reduce an object to actual physical possession. On the other hand, it may be defined as a desire to exert any type of illegal influence over an object. Certainly persons illegally involved with contraband goods are often in the business of

selling them to other persons any may do so without ever reducing the goods to actual physical control. The present case may well be indicative of that type of situation. The broad definition of intent to control is therefore accepted as the correct guideline for the determination of narcotics possession.

Applying the above analysis of narcotics possession to the instant case, the scope of our review is brought into perspective. The issue before the court is whether the evidence presented is sufficient to prove the defendants knew the narcotics were present. They were actually transporting the contraband; the question is whether they intended to do so. *If they knew contraband was present,* then certainly they were transporting it intentionally. This knowledge may be established by logical inferences drawn from the surrounding circumstances. **Commonwealth v. Whitman,** 199 Pa. Superior Ct. 631, 634 (1962). Also see **Commonwealth v. Shaffer,** 447 Pa. 91 (1972). However, if the evidence presented allows an *equally* logical inference that the defendants did not know *or have reason to know* contraband was present, the conviction must be reversed. **Commonwealth v. Armstead,** supra; **Commonwealth v. Henderson,** 451 Pa. 452 (1973).

Although possession of narcotics may be both joint and constructive (particularly of such a large quantity), "mere proximity to the drug, or mere presence on the property where it is located or mere association with the person who does control the drug or the property, is insufficient to support a finding of possession . . ." **United States v. Davis,** 461 F. 2d 1026, 1035, 1036 (3d Cir. 1972). Also see **Commonwealth v. Tirpak,** 441 Pa. 534 (1971). In other words, the circumstances which will permit a finding of knowledge (or intent to control)

must be more than one of physical location near the drug or those in actual physical possession of it. Numerous Pennsylvania decisions demonstrate the proposition that guests or visitors (and even occupants) in a residence (or vehicle) may not be convicted for proximity to a drug, even when it is lying in open view. **Commonwealth v. Tirpak,** supra; **Commonwealth v. Updegrove,** 223 Pa. Superior Ct. 7 (1972); **Commonwealth v. Tine,** 221 Pa. Superior Ct. 318 (1972); **Commonwealth v. Schulhoff,** 218 Pa. Superior Ct. 209 (1971); **Commonwealth v. LaRosa,** 218 Pa. Superior Ct. 203 (1971); **Commonwealth v. Dasch,** 218 Pa. Superior Ct. 43 (1971). The reason for these holdings is logical. Where narcotics or drugs are readily accessible to a number of people, then any one person or combination thereof may be involved in the illegality. Without other facts and circumstances indicating his individual guilt, no specific person may be convicted merely because he is near to the location of the narcotics. A guest in a residence may not be aware of the presence of drugs even if they are in open view. An occupant may not know of their existence if they are secreted. Especially where a small quantity of a drug is involved, it may be of such a nature that normally only one person would possess it. However, when there is evidence that the narcotics have been utilized, processed, or otherwise handled within a short time before seizure, and there is also evidence that the defendant was present at that time, then presumably there is sufficient proof to support a conviction. See **United States v. Davis,** supra.

In **Commonwealth v. Tirpak,** supra, marijuana and extinguished marijuana cigarettes were seized from within open view of seven individuals who were guests on the premises. The occupant pleaded guilty to possession of the substances; the

guests pleaded not guilty but were convicted. Four of the guests appealed their convictions which were reversed by the Supreme Court. Although the court was not explicit in its reasoning, it is obvious that there was no evidence that the guests were either aware of the presence of the drugs or intended to control them. The situation would certainly have been different, however, if the appellants in that case were all seated around a lighted marijuana cigarette. That circumstance would permit a finding of knowledge upon which inferences of actual control or intent to control would logically be based. Precisely this type of situation is found in **United States v. Davis**, supra. In that case, the Circuit Court of Appeals upheld the conviction on possession of heroin of a temporary resident in the house where the substance was found. Her conviction was based on evidence that she was present in the apartment when the heroin was discovered lying in plain view and that the drug had recently been measured and placed in bags.

Examining the evidence in the present case, the initially important circumstances are: (1) that the two defendants were stopped by police while traveling in a vehicle from some location, presumably Detroit, eastward on the Pennsylvania Turnpike to another location, presumably Newark, on the morning of June 14, 1972; (2) that the same two defendants were traveling in the same vehicle westbound on the Pennsylvania Turnpike on the evening of June 14, 1972, when stopped by police; (3) that the vehicle was registered to Theresa Brown of Detroit, Michigan, who was not present in the vehicle at either time the police stopped it; (4) that the defendants denied any knowledge of a trunk key and no key was ever found which could be inferred to have been in the defendants' possession at that time; (5) that the trunk was entered from the

interior of the vehicle and a sealed cardboard box was found inside; and (6) that the box was found to contain approximately $6.8 million in heroin and cocaine.

These facts present a clear picture. It is inconceivable that anyone would permit the defendants to borrow a vehicle with that large a quantity of heroin in the trunk. The only logical inference is that the defendants drove the vehicle to some location where the heroin was placed in the trunk to be delivered at some ultimate destination. The defendants may certainly be inferred to have been the only occupants in the vehicle that day and are therefore in a different position from the exonerated *Tirpak* defendants. Jackson and Garrett were the *sole occupants* of the vehicle in which the drugs were concealed.

The situation here is also distinguishable from **Commonwealth v. Dasch,** supra. In that case the driver-owner of a second-hand car, which admittedly had carried numerous passengers, was convicted of possession of marijuana particles which were found on the rear floor of the vehicle. The substance could have gotten on the floor of that vehicle in so many ways, completely unknown to the defendant, that no logical inference of knowledge could be attributed to him. In the instant case, the possibility that the cardboard box in which the drugs were found was placed in the trunk without the defendants' knowledge is so remote that it may permissibly be ignored.

Since it can logically be concluded that the defendants were present when the cardboard box was placed in the trunk, the absence of a trunk key becomes important. Either the

defendants had a trunk key which they secreted, or the trunk was opened by a key in someone else's possession at the eastbound destination.

If the first inference is correct, then the secretion of the key is a circumstance indicative of knowledge. If the second circumstance is true, then the defendants were *at least put on notice of the possibility of illegality,* since it is indeed unusual to find someone traveling a long distance without access or a means of access to a spare tire carried in the trunk. See **Commonwealth v. Henderson,** supra.

If either conclusion were reached, the inference may logically be drawn that the defendants knew they were committing an illegal act. Further, other circumstantial evidence indicating that the defendants were aware that the box contained narcotics was also before the court. This circumstantial evidence not only helps to prove that they knew the narcotics were in the trunk, but also supports the initial inferences drawn above.

The defendants were apprehended while speeding 90 miles per hour in a 65-mile-per-hour zone. Jackson was driving the vehicle at that time. Although innocent persons certainly speed, in this situation the illegal cargo could certainly be inferred to have been the reason the defendants were in such a hurry. The deduction that the defendants were in such a hurry to reach their destination is a circumstance similar to flight from a crime. Additionally, the defendants made false and contradictory statements to the police, a circumstance which is always indicative of guilt. **Commonwealth v. Pinckney,** supra, at 376, (citing authority).

These two factors are certainly sufficient to dispell any doubt as to whether the defendants knew they were transporting narcotics. The very great amount of the drug supports a conclusion that it was intended for sale and not for personal use. All of the circumstances taken together leave no question that both defendants could be found guilty beyond a reasonable doubt of possession with intent to deliver the narcotics. Simple possession of heroin and conspiracy are necessarily lesser included illegal acts also committed. The convictions are therefore affirmed.

II. DESTRUCTION OF BOX IN WHICH NARCOTICS WERE FOUND.

The defendants further contend that their rights under the Fourteenth Amendment of the U.S. Constitution were violated because the prosecution failed to produce at trial the cardboard box in which drugs had been found. The record shows, however, that the box was present at the preliminary hearing (N.T. 92, 93) where it was available for inspection by the defendants. The Pennsylvania Rules of Criminal Procedure would have enabled its pretrial inspection upon a showing of exceptional circumstances and compelling reasons (Pa. R. Crim. P. §310). No such request was made by the defendants. The first request for production and examination of the box and the first assertion of its alleged materiality did not occur until trial, when it became known that the box was unavailable (N.T. 75). Under these circumstances, the current claim of materiality of the box as evidence loses force. We shall, however, examine this matter further.

The United States Supreme Court set forth the now-settled

rule concerning prosecution suppression of evidence in **Brady v. Maryland,** 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) as follows:

> We now hold that the suppression by the prosecution of *evidence favorable to an accused* upon request violates due process *where the evidence is material either to guilt or to punishment,* irrespective of the good faith or bad faith of the prosecution. *Id.* at 10 L. Ed. 2d 218. (Emphasis added.)

Thus there can be no denial of due process and consequently no grounds for a new trial arising from such a denial unless the evidence suppressed is shown to be material to guilt or punishment of the defendant. Recent Pennsylvania court decisions considering this issue establish that a new trial will not be granted if the evidence allegedly suppressed is not exculpatory to the defendant. **Commonwealth v. Powell,** 449 Pa. 126, 129-31 (1973); **Commonwealth v. Cox,** 209 Pa. Superior Ct. 457, 461-63 (1967). This position has been adopted in other jurisdictions as well. See **Hale v. State,** 248 Ind. 630, 230 N.E. 2d 432 (1967); **State v. Blankenship,** 277 Minn. 32, 151 N.W. 2d 410 (1967).

In the case at bar, the box allegedly suppressed by the prosecution was not material to the guilt or punishment of the defendants, and its production at trial could by no means have been exculpatory. The defendants were charged with possession of controlled substances, *not* possession of a *box* of controlled substances. The arresting officer testified at trial to the salient facts surrounding the box, including its loss and apparent destruction (N.T. 79-81). The only fact conceivably material to the guilt of the defendants was that the box was sealed, which

was unequivocally established by Trooper Wynn's uncontradicted testimony at trial (N.T. 79). Thus the defense request that the court order production of the box at trial, unsupported by any evidence of its materiality or of any additional exculpatory circumstance that might arise from its physical presence, was properly denied. The argument on the present motion that the box should have been produced at trial to enable fingerprinting fails for that same reason. Trooper Wynn testified that no fingerprints had been lifted because the box had been handled by many persons after arrest of the defendants (N.T. 81). Furthermore, even the complete absence of the defendants' fingerprints on the box would, under the circumstances, have no bearing on the determination that they had possession of the contraband contained therein.

The defendants' briefs in support of this motion rely heavily on **United States v. Bryant,** 439 F. 2d 642 (D.C. Cir. 1971) and **United States v. Augenblick,** 393 U.S. 348, 89 S. Ct. 528, 21 L. Ed. 2d 537 (1969) to establish an affirmative duty on the Commonwealth to have preserved the box in this case and to have produced it at trial. Both *Bryand* and *Augenblick* are, however, concerned with destruction of vital evidence or evidence potentially favorable to the defendant. No such significance attaches to the box in the present case. Furthermore, neither *Bryand* nor *Augenblick* is analogous to the case at bar. *Bryant* deals with the prosecutor's duty where pretrial discovery under the Federal Rules of Criminal Procedure is requested. As previously discussed, there was no such request in this case. Furthermore, former Justice Fortas in his concurring opinion in **Giles v. Maryland,** 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737, 760 (1967), noted that rules of discovery have no applicability to the question of prosecution

suppression of evidence at trial. Thus the rule of *Bryant* clearly does not apply in the instand situation, nor does the holding in *Augenblick,* which was decided by virtue of the provisions of the Jencks Act, 18 U.S.C.A. §3500. In *Augenblick* the court took great care to explain that the decision did not rise to constitutional dimensions, and that provisions of the Jencks Act and decisions thereunder were never extended to state criminal trials. *Augenblick,* supra, at 21 L. Ed. 2d 545.

It is our opinion that the post-*Brady* decision in **Stepps v. State,** 242 Ark. 587, 414 S.W. 2d 620 (1967), U.S. cert. denied 389 U.S. 1036, 88 S. Ct. 766, 19 L. Ed. 2d 823 (1968), is clearly analogous to the present case with respect to the issue of alleged prosecution suppression of evidence. In that case the defendant was convicted of voluntary manslaughter and there was dispute as to whether the victim had a knife in his hand when he was killed. A witness testified that upon returning to the scene of the crime after taking the victim to the hospital, he found a knife on the floor which was appropriated by a police officer to whom it was shown. The officer testified he had placed the knife in a locker but that it was lost or mislaid before trial. The court held that failure to produce the knife at trial was not a denial of due process because the officer had testified to its discovery and subsequent loss, and there was no reason to suppose that the trier of fact disbelieved the officer's uncontradicted statements or that the accused's position would be strengthened by actual production of the knife. *Stepps,* supra, at 622.

In the present case, Trooper Wynn testified to the discovery and later probable destruction of the box in which the contraband was found, and his testimony describing the box

was uncontradicted even though the defense had an opportunity to examine the box when it was present at the preliminary hearing. Furthermore, his testimony revealed the only possibly exculpatory factor, that the box was sealed, and there is consequently no reason to believe the defendants' case could be strengthened by production of the box. Thus, just as in *Stepps,* there has been no denial of due process in the case at bar.

III. JURISDICTION OF THE COURT

The defendants contend that the Commonwealth cannot prosecute persons transporting drugs from one foreign jurisdiction to another via Pennsylvania highways because to do so would give unintended extra-territorial effect to The Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, P.L._____, No. 64 §1 et seq. (35 P.S. §780-101 et seq.) and would thereby violate the commerce clause of the United States Constitution.

It is well established, however, that a state may exercise its police power to regulate the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. **Robinson v. California,** 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758, 761-62 (1962). See also **Minnesota ex rel. Whipple v. Martinson,** 256 U.S. 41, 41 S. Ct. 425, 65 L. Ed. 819, 822 (1921). There can be no doubt that Section 13 of The Controlled Substance, Drug, Device and Cosmetic Act (35 P.S. §780-113), as amended, was created by the legislature as an exercise of its power to prohibit possession or possession with intent to deliver heroin and cocaine within the confines of

Pennsylvania.[1] It is furthermore inconceivable that the proscriptions of that section would not apply to travelers on the Pennsylvania Turnpike, as undoubtedly the legislature does not intend that highway to function as a corridor for drug traffic across the Commonwealth.

The possession of such a large quantity of contraband by the defendants in the present case certainly gives rise to an inference that they intended to deliver at least part of it; and from their presence in Pennsylvania at the time of their apprehension, it is also readily inferable that they intended to make their delivery within the Commonwealth. Although Trooper Wynn testified that the defendants told him they were enroute from Newark, New Jersey, to Detroit, Michigan, when stopped on the turnpike (N.T. 34, 35), there is no evidence that the defendants intended to deliver all of their illicit cargo outside the borders of Pennsylvania. It is at least equally inferable that they intended to deliver all or a part of it within the Commonwealth. The Pennsylvania Turnpike, although a limited-access toll road, contains many points of ingress and egress between the point where the defendants were apprehended and the western border of Pennsylvania, and tolls are not paid until the vehicle exits the highway at one of these controlled interchanges. The defendants might have exited at any one of the interchanges to deliver their cargo within the state, or they could have delivered all or a portion of it without

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[1] See generally Statutory Construction Act, Act of May 28, 1937, P.L. 1019, Art. III §31, Art. IV §§51, 52 (46 P.S. §§531, 551, 552), and cases thereunder.

exiting, whether in transit or while stopped at any service or rest area along the highway. Absent clear evidence of the defendants' intent to deliver all of their cargo outside Pennsylvania, the inference that they intended to deliver it within the Commonwealth is valid.

The defendants' contention that the Commonwealth's prosecution of nonresidents transporting drugs through the Commonwealth is violative of the Commerce Clause of the United States Constitution is without merit. The United States Supreme Court has stated:

> Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346, 59 S. Ct. 528, 83 L. Ed. 752, 756 (1939). See **Com. v. Flickinger,** 365 Pa. 59, 63 (1950).

In view of the expressed state's authority to regulate narcotics traffic within its borders *(Robinson,* supra, at 761), to hold the exercise of state police power in the present case unconstitutional would be to foment unrestricted trafficking of dangerous drugs and narcotics inimical to the health, welfare, safety, and morals of citizens of the Commonwealth, in derogation of the clear intent of the legislature.

ORDER OF COURT

AND NOW, September 10, 1973, for the reasons set forth above, the motions in arrest of judgment and for new trial filed

on behalf of each defendant are overruled and the defendants are directed to appear for sentence at the call of the district attorney.

By the Court,

/s/ Dale F. Shughart

P.J.